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Attorneys for Defendant
Bock Evans Financial Counsel, LTD

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CHARLOTTE B. MILLINER, as trustee of the
Charlotte B. Milliner Trust dated January 30,
1997, and as owner and holder of the
CHARLOTTE B. MILLINER SEP IRA;
JOANNE BREM, as Trustee of the Van Santen-
Brem Revocable Trust, for themselves and on
behalf of all others similarly situated,

Plaintiffs,

v.

BOCK EVANS FINANCIAL COUNSEL,
LTD, a Colorado corporation;

Defendant.

Case No. CV-15-1763 TEH

PUTATIVE CLASS ACTION

**DECLARATION OF ERWIN J.
SHUSTAK, ESQ. IN SUPPORT OF
MOTION TO WITHDRAW AS
COUNSEL FOR DEFENDANT BOCK
EVANS FINANCIAL COUNSEL, LTD**

Judge: Hon. Thelton E. Henderson

Hearing Date: January 25, 2016
Time: 10:00 a.m.

I, Erwin J. Shustak, Esq., hereby declare and state as follows:

1. I am a shareholder and Managing Partner of Shustak Reynolds & Partners, P.C. ("the Shustak Firm"). I submit this Declaration in support of the Shustak Firm's Motion to Withdraw as Counsel for Defendant Bock Evans Financial Counsel, LTD. ("Bock Evans"). I have personal

1 knowledge of the facts stated herein. If called upon to testify, I could and would testify competently
2 thereto.

3 2. As this Declaration is in support of our law firm's application to be relieved as
4 counsel of record for a client, I will disclose what I believe is the minimum information necessary
5 for this motion and the Court's information while, at the same time, respecting and maintaining the
6 attorney/client confidences shared between the client and our firm. If this Court wishes more
7 information from our firm, I am happy to provide it for an *in camera* review by this Court. Nothing
8 set forth in this Declaration is intended to waive, in any way, the attorney/client privilege between
9 our firm and our client.

10 3. In February, 2015 Bock Evans and its two principals, Mary Evans and Thomas
11 Bock, retained our firm to defend them in a FINRA proceeding that Plaintiff Charlotte Milliner
12 brought against them. We did not know these clients and this was our first representation of them.
13 Ms. Milliner, one of the two putative class representatives in this case was, and continues to be,
14 represented by the same attorney in that FINRA arbitration who purports to be counsel for this
15 putative class action, David Sturgeon-Garcia, with Charles D. Marshall as co-counsel. We entered
16 into a negotiated attorney/client fee agreement with Ms. Evans, Mr. Bock and Bock Evans dated
17 February 5, 2015. I will make a copy of that agreement available to this Court for its inspection
18 under seal or under other confidentiality-preserving procedures as deemed appropriate by this Court
19 should the Court wish to review a copy.

20 4. That retainer agreement contains all of the terms and conditions of our firm's
21 engagement. It provides that we would be paid a retainer against which we would charge our time;
22 specifies that all of our invoices are payable on receipt; specifies the charges by every attorney and
23 paralegal in our firm; details our billing practices and it specifically provides that "We may
24 withdraw from your case if you breach this agreement or refuse to cooperate or follow our advice
25 on a material issue".

26 5. Since Bock Evans is not a member of FINRA, and not subject to FINRA jurisdiction
27 (the firm is a Colorado registered Investment Advisor), our clients directed us to move to compel
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1 arbitration of any of Milliner's claims against Bock Evans before the American Arbitration
2 Association, the arbitration forum specified in the agreement between Bock Evans and Milliner.
3 We filed a Petition to Compel Arbitration before the California Superior Court and Milliner,
4 through her attorneys, removed that Petition to this Court, before a different United States District
5 Court Judge. Ultimately, this Court declined to compel arbitration and that Petition became moot.

6 6. Thereafter, while Milliner's individual FINRA arbitration against Bock Evans, Ms.
7 Evans and Mr. Bock was pending, in which she was and is represented by the same attorneys, she
8 and her attorneys then filed this putative class action. What ensued was, in my opinion, very
9 aggressive, scorched earth litigation intended to bludgeon Bock Evans into a settlement. Despite
10 representing Milliner in her individual claims before FINRA, her same counsel purport to act as
11 class counsel for a putative class of which Milliner purports to be a class representative. Although I
12 believe that, ultimately, this Court would deny any application by Milliner to be class
13 representative, and her counsel to be class counsel in light of her pending individual claims, this
14 case has been heavily litigated and there has and continues to be extensive discovery.

15 7. The litigation costs to Bock Evans quickly mounted. The retainer was depleted in
16 early 2015. Our client has very little, if any, experience with federal litigation and may not have
17 appreciated the full extent, and cost, of defending a federal class action litigation. As the costs of
18 litigating this case escalated, Bock Evans began to fall behind in payments to our firm. As of today,
19 our firm is owed more than \$80,000.00 for our work. Based on discussions with our client, we
20 understand that Bock Evans is, essentially, illiquid and insolvent and its debts greatly exceed its
21 assets. We also have been advised there is no money with which to pay our firm for work already
22 undertaken, let alone the extensive work anticipated in the foreseeable future. Bock Evans has,
23 unfortunately, breached the terms of our retainer agreement, is not following our advice on material
24 litigation strategy issues and is financially unable to pay our firm for our past, current and future
25 work.

26 8. Bock Evans is a very small investment advisory firm. While we tried to convey that
27 information to Plaintiffs' counsel, I do not think they believed us. At my suggestion, I asked Bock
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1 Evans, working through its own, independent corporate and bankruptcy counsel, to prepare a draft
2 Chapter 7 Bankruptcy Petition. This Court is aware that we were given a deadline of December 14th
3 by which to provide a copy of that Petition to Plaintiffs' counsel. We received that draft Petition on
4 the morning of December 14th and promptly provided a copy to Plaintiffs' counsel in accordance
5 with this Court's Minute Entry dated November 30, 2015 and filed as Document Number 49 with
6 this Court's docket. If this Court would like a copy, I am happy to provide one. The draft Petition
7 is the first idea I had of exactly how illiquid Bock Evans actually is.

8 9. We did not prepare that draft Chapter 7 Petition. It was prepared by Bock Evans and
9 its own, independent Bankruptcy counsel whom we do not know. The highlights of the draft
10 Petition are sobering. According to the Petition, Bock Evans has assets, valued at current fair
11 market value, of \$11,786.00. Against those assets, there are listed liabilities of app. \$180,000.00.
12 There are three creditors of Bock Evans, the largest of which is our firm. The draft Petition lists the
13 amount owed to our firm as \$73,650.00. We continue, however, to work on the case and, through
14 the month of December, for which we have not yet billed, there is at least another \$10,000.00 to
15 \$15,000.00 or more of unbilled work in process. We have not been paid by our client for a number
16 of months and we have been informed that there are no available funds with which Bock Evans can
17 pay our firm.

18 10. The draft Petition also states the gross annual revenues of Bock Evans which have
19 been declining. In 2013, revenues for the firm were \$197,000.00. For 2014, they had dropped to
20 \$107,000.00 and for 2015 to date, they were less than \$50,000.00. Between the firm's liabilities,
21 which are more than 16 times greater than its assets, and the fact the firm's gross revenues year to
22 date are less than \$50,000.00, it is obvious the firm is insolvent and unable to pay its current and
23 past liabilities, let alone have any funds with which to pay any judgment in this case even if one
24 were to be awarded against it. Meanwhile, our firm continues to respond to extensive discovery and
25 other matters, all without pay or assurance of when, if ever, we would be paid for our services.

26 11. We have given what we believe to be the only sensible advice to Bock Evans. Our
27 client, however, has not made a decision; is not sure when, if ever, it will actually file the
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1 Bankruptcy Petition and seek protection from its creditors, and our firm is left twisting in the wind.
2 We are in the unenviable position of spending our time and effort, without pay, to defend an
3 insolvent company that is not, and cannot pay for its attorneys and which, in our opinion, is not
4 worth defending, given its apparent insolvency. In effect, while we have a cordial relationship with
5 our client, our client is not following our advice on a very critical issue and expects our firm to
6 continue to work without pay defending an insolvent company with virtually no assets and
7 liabilities that greatly exceed whatever assets it has. And our firm is our client's single biggest
8 creditor.

9 12. We are a small firm of ten attorneys. We cannot continue to represent Bock Evans
10 without pay without seriously injuring and financially damaging our firm and our economic
11 viability. Bock Evans has breached our retainer agreement, not only by failing to pay for our
12 services but by not following our advice on a material issue. Non-payment and not following our
13 advice has created an irreconcilable difference between our client and our firm. We will need to file
14 a collection action against our own client. Under the applicable ethical rules, however, cited in our
15 memorandum of law, any such collection action will prevent us from representing our client. We
16 are, unfortunately, between a rock and a hard place. Our ability to give independent legal advice to
17 our client is seriously in jeopardy, since advice of what can or should be done to defend this
18 litigation, is colored by the fact that our firm has not been paid, and is not being paid and will not be
19 paid for our advice and our services. Our client does not have the ability to pay us; it has breached
20 the terms of our retainer agreement; it is not following our advice on a material issue and it has not
21 made a decision of what it intends to do despite having the benefit of advice from its independent
22 corporate and its bankruptcy counsel. We have been discussing these issues with our client for
23 more than a month with no clear direction from our client other than it expects us to continue
24 working on its behalf without any assurance of payment.

25 13. On December 8, 2015, I informed Bock Evans, both verbally and in writing, of our
26 intention to move to withdraw as counsel. This included informing Bock Evans that if our motion to
27 withdraw was granted, and they chose not to pursue bankruptcy, they would need to retain new
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1 counsel to represent them in this action otherwise a judgment may be entered against them. I have
2 since had further conversations with Bock Evans concerning our intent to withdraw and have
3 encouraged them to obtain new counsel.

4 14. We respectfully ask this Court to allow us to withdraw as counsel of record for Bock
5 Evans. Our client has breached its agreement with us; our advice is not being followed; we are not
6 being paid for the extensive amount of time we have, and continue to spend defending a baseless
7 putative class action being pursued by a named individual, and her attorneys, who already are
8 prosecuting her same, individual claims against the same defendant, seeking duplicative recoveries
9 in different forums. Our client is essentially insolvent and, in our opinion, not financially worth our
10 sacrifice of working for free to defend.

11 I declare under penalty of perjury under the laws of the State of California that the foregoing
12 is true and correct. Executed on December 15, 2015 in San Diego, California.

13 s/ Erwin J. Shustak

14 ERWIN J. SHUSTAK, ESQ.
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